

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DOCKET FILE COPY ORIGINAL RECEIVED

SEP 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Administration of the North) CC Docket No. 92-237
American Numbering Plan)
Carrier Identification Codes (CICs))

OPPOSITION OF U S WEST, INC.

I. INTRODUCTION

U S WEST, Inc. ("U S WEST") opposes VarTec Telecom, Inc.'s ("VarTec")¹ Application for Review ("AFR") filed August 8, 1997, wherein VarTec requests that the Federal Communications Commission ("Commission") review the recent Order of the Common Carrier Bureau ("Bureau")² denying VarTec's May 19, 1997, Emergency Motion for Stay.³ In its Motion for Stay VarTec requested that the Commission stay the implementation of its Second Report and Order,⁴ asserting

¹ VarTec is an interexchange carrier ("IXC") which offers "dial-around" long distance service utilizing a 10XXX dialing pattern made possible through five-digit Carrier Access Codes ("CAC"), the last three digits of which (the "XXX") are carrier-specific Carrier Identification Codes ("CIC").

² In the Matter of Administration of the North American Numbering Plan Carrier Identification Codes (CICs), CC Docket No. 92-237, Order, DA 97-1524, rel. July 18, 1997 ("Order").

³ Emergency Motion for Stay of VarTec Telecom, Inc., filed May 19, 1997 ("Motion for Stay").

⁴ In the Matter of Administration of the North American Numbering Plan Carrier Identification Codes (CICs); Petition for Rulemaking of VarTec Telecom, Inc., CC Docket No. 92-237, Second Report and Order, 7 Comm. Reg. (P&F) 709 (1997).

04

that its request meets all four requirements for the grant of such a stay: 1) that there is a strong likelihood that VarTec will prevail on the merits of its appeal; 2) that it will be irreparably harmed if the stay is not granted; 3) that others will not suffer substantial harm by grant of the stay; and 4) that a stay will serve the public interest.

As stated in our Comments opposing VarTec's Motion for Stay, that Motion was but another attempt to secure a reconsideration of the Commission's decision not to grandfather three-digit CICs, and an untimely attempt at that.⁵ The issues raised in VarTec's Motion for Stay were substantially similar to those raised in its Petition for Reconsideration of the Second Report and Order, and represented arguments it had made persistently in all of its previous filings in this proceeding.⁶ VarTec raised no new matters and failed to meet the procedural requirements for a stay. The Bureau concluded that such was the case and denied the Motion for Stay.

The instant AFR is yet another attempt at reconsideration of the Commission's decision in its Second Report and Order. For that reason, and because granting the Motion for Stay would cause others substantial harm by way of competitive disparity, the Commission should follow the lead of the Bureau and deny VarTec's AFR.

⁵ Comments of U S WEST, Inc., filed May 27, 1997, at 1.

⁶ Comments of VarTec Telecom, Inc., filed herein June 3, 1994; Petition for Rulemaking filed May 11, 1995; Petition for Reconsideration of VarTec Telecom, Inc., filed May 19, 1997; and Reply to Comments in Opposition to Petition for Reconsideration of VarTec Telecom, Inc., filed herein June 30, 1997.

II. THE BUREAU CORRECTLY REJECTED VARTEC'S MOTION FOR STAY

In its recent Order, the Bureau addressed each of VarTec's arguments in turn, but noted that it "need not examine all four factors if [it] f[ound] that a party fail[ed] to meet its burden on any one of these factors. A showing of irreparable harm, for example, is an essential factor in any request for a stay."⁷ The Bureau found that "VarTec ha[d] not demonstrated that the complete transition, by January 1, 1998, to four-digit CICs and seven-digit CACs, without grandfathering any three-digit CICs or five-digit CACs, w[ould] cause harm to VarTec that is certain."⁸ The Bureau also found that VarTec had provided "no evidence to support its allegation that its reputation would be tarnished if the Commission's requirement that VarTec cease using five-digit CACs [was] not stayed."⁹ And, finally, the Bureau rejected VarTec's "contention that a stay must be granted because trademark, trade name, and service mark infringements constitute[d] irreparable harm per se," noting the flaw in that argument was that carriers do not "own" codes or numbers.¹⁰

In its AFR, VarTec again asserts that it will suffer irreparable harm absent the requested stay.¹¹ VarTec's fundamental argument is that the way in which VarTec decided to enter into the business of providing interexchange service makes

⁷ Order ¶ 12 (footnotes omitted).

⁸ Id. ¶ 14.

⁹ Id. ¶ 15.

¹⁰ Id. ¶ 16.

¹¹ AFR at 1.

it difficult for VarTec to communicate with its existing customer base which has received prior communications or information from VarTec incorporating its three-digit CIC dial-around number.¹² To the extent it could even identify its existing customers, VarTec asserts that it is unlikely that those individuals would read an additional mailing from VarTec, since – so far as VarTec knows – those individuals already know how to use the service.¹³ Essentially, VarTec claims that it is impossible for it to adequately educate its customers about the change in the dialing pattern necessary to utilize its service. In turn, this inability to educate will lead to severe damage to VarTec’s goodwill and reputation and eventually to loss of business.

As did the Bureau, the Commission should deny VarTec’s instant request for relief. VarTec chose to enter the interexchange business through a shot-gun mass marketing approach. It should not now be heard to complain that such business decision renders it difficult or impossible to communicate with its customer base about the consequences of regulatory decisions rendered with a view toward competitive neutrality and the promotion of the entire telecommunications industry.

¹² For example, VarTec notes that it markets its services through direct mailings which go to tens of millions of potential customers every year. From that pool of potential customers, some actually use VarTec’s services, but VarTec does not know who those customers are because the billing is done through billing and collections agreements with local exchange carriers (“LEC”). AFR at 4. Furthermore, VarTec has chosen to market its services primarily through a service name (e.g., DimeLine®), rather than to “prominently feature[]” its own name.” Id. at 5.

¹³ Id. at 5-6.

As VarTec entered the market, it should aggressively begin market education. It may be that mass market mailings might be used which could contain a conspicuous message on the mailing that the information contained therein is urgent and could affect customers attempting to use DimeLine® service.¹⁴ Alternatively, other mass market type of communications vehicles are available (such as radio, television, cable, etc.).

The industry was “made aware of the scarcity of CICs and that three digit CICs would soon need to be replaced by four digit CICs” as far back as 1989 when Bell Communications Research (“Bellcore”), the NANP administrator for administering and assigning CICs, informed the Chief of the Common Carrier Bureau of the projected assignment date of the last unassigned three-digit CICs.¹⁵ Indeed, VarTec – which admittedly has “spent the past seven years building a customer base”¹⁶ – entered the long-distance market at approximately the same time as Bellcore was putting the industry on notice regarding the potential exhaust of the three-digit CICs.¹⁷

¹⁴ From VarTec’s filing, it is unclear whether the “tens of millions of direct mail pieces sent to potential customers every year” (AFR at 4) go to a fairly stable base of potential customers or change every year. If the former, a direct mailing would obviously be easier (and less costly) to undertake than if the latter. Furthermore, to the extent that VarTec has insinuated itself in the market through its product name rather than its corporate name, the educational communication could reflect that.

¹⁵ Second Report and Order, 7 Comm. Reg. at 712 ¶ 5.

¹⁶ Reply to Comments in Opposition to Petition for Reconsideration of VarTec Telecom, Inc., filed June 30, 1997, at 6.

¹⁷ VarTec was incorporated in the State of Texas on February 27, 1989 (Comments of VarTec Telecom, Inc., filed June 3, 1994, at 1).

Furthermore, the issue of the potential exhaust of three-digit CICs was formally addressed by the Commission when it issued its Notice of Proposed Rulemaking in this proceeding in April, 1994.¹⁸ While that Notice did propose a transition timeline longer than ultimately adopted by the Commission, certainly any prudent business utilizing a three-digit CIC had to have understood the need for contingency planning – a need that was all the more evident with the passage of the Telecommunications Act of 1996.¹⁹ Clearly, VarTec should have been considering ways to forestall its alleged losses for years, certainly since 1994, and arguably since as early as 1989.

¹⁸ Second Report and Order, 7 Comm. Reg. at 710 ¶ 2 citing to the NPRM in this proceeding, 9 FCC Rcd. 2068 (1994), wherein the Commission tentatively concluded “that an industry plan to expand Feature Group D CICs from three to four digits, in anticipation of all the three digit codes being assigned, was a reasonable way to ensure that future demand for CICs could be met” (footnotes omitted).

¹⁹ Second Report and Order, 7 Comm Reg. at 711-12 ¶¶ 3 (“[I]mplementation of the amendments to the Communications Act of 1934 (the Act) in the Telecommunications Act of 1996 . . . most likely will increase the number of telecommunications carriers entering the market and create an increased need for CICs so that traffic can be routed to these new entities. Consequently, we recently issued a Public Notice to refresh the record in this docket with information that would permit the Commission to establish a reasonable period for the industry to complete the steps necessary for a total conversion from three digit Feature Group D CICs to four digit Feature Group D CICs.” (footnotes omitted)); 4 (“Because of the changing circumstances since the record in this docket closed in 1994, we find that the transition should end as soon as practicable, and that shortening the originally proposed six-year transition to a two-year and nine month transition will serve the overall pro-competitive purposes of the Act (by making more CICs available), as well as the specific purposes of Sections 251(e) (by ensuring that numbers are available on an equitable basis) and 251(b)(3) (by lessening hardships, consistent with the duty imposed on all LECs to provide nondiscriminatory access to telephone numbers, caused by the conservation plan’s limiting access to CICs).”); Order ¶ 2 (“In the CICs Second Report and Order, the Commission decided that the transition will end on January 1, 1998. The Commission’s decision was intended to advance

VarTec should have been taking continuous steps to address its customer communication/education difficulties – difficulties of its own business decision making. The fact that VarTec took no steps to ameliorate any impending harm but seems to have continued to market and promote a dialing pattern that was unlikely to continue is not the fault of the industry or the Commission.

Moreover, while LECs are not required to provide any type of intercept message after the January 1, 1998, transition to seven-digit CACs,²⁰ U S WEST currently provides an intercept message when an access code is misdialed or the dialed code is not active in the LEC's region (i.e., when the access-code-identified carrier does not, or is not authorized to, provide service in that region).²¹ U S WEST plans to continue to use this intercept message after the January 1, 1998, transition to seven-digit CACs and has brought the subject of a standardized intercept message before the Network Interconnection Interoperability Forum ("NIIF") (one of forums of the Alliance for Telecommunications Industry Solutions). This issue is on the agenda for discussion at the NIIF's October meeting.

It is clear from VarTec's Motion for Stay that an intercept message would substantially alleviate any harm that it might otherwise suffer. Because such intercept message will likely be provided by most LECs, any harm VarTec might

the procompetitive objectives of the Communications Act of 1934 . . . as amended by the Telecommunications Act of 1996. . . .").

²⁰ AFR at 4.

²¹ U S WEST's current intercept message is: "We're sorry, your call cannot be completed with the access code you dialed. Please check the code and dial again, or call your long distance carrier for assistance."

perceive as associated with the transition might well be illusory or temporary, at most.

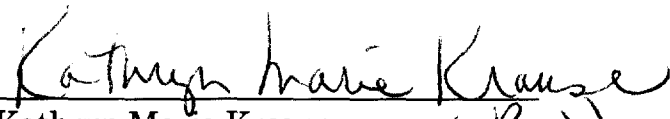
III. CONCLUSION

As discussed above, VarTec's AFR is merely one more in a string of attempts for reconsideration of issues already ruled upon by the Commission. U S WEST urges the Commission to stay the course it has established for the transition from three-digit to four-digit CICs, thus ensuring dialing parity across the industry. The Commission should deny VarTec's AFR.

Respectfully submitted,

U S WEST, INC.

By:


Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859
(RW)

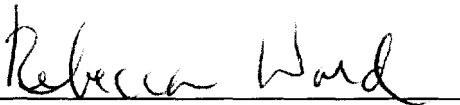
Its Attorney

Of Counsel,
Dan L. Poole

September 2, 1997

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 2nd day of September, 1997, I have caused a copy of the foregoing **OPPOSITION OF U S WEST, INC.** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.


Rebecca Ward

*Served via hand-delivery

(CC92237G.COS/KK/ss)

***James H. Quello**
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

***Reed E. Hundt**
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

***Susan P. Ness**
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

***Rachelle B. Chong**
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

***Regina M. Keeney**
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

***Geraldine Matise**
Federal Communications Commission
Room 235
2000 M Street, N.W.
Washington, DC 20036

***International Transcription
Services, Inc.**
1231 20th Street, N.W.
Washington, DC 20036

James U. Troup
Roger P. Furey
Arter & Hadden
Suite 400K
1801 K Street, N.W.
Washington, DC 20006-1301
(2 Copies)

VARTEC
CGI & COMMUNIGROUP

Randall B. Lowe
Mark J. O'Connor
Piper & Marbury, LLP
7th Floor
1200 19th Street, N.W.
Washington, DC 20036

LDI

Genevieve Morelli
Competitive Telecommunications
Association
Suite 800
1900 M Street, N.W.
Washington, DC 20036

Colleen Boothby
Thomas Lynch
Levine, Blaszak, Block and Boothby
Suite 500
1300 Connecticut Avenue, N.W.
Washington, DC 20036-1703

TELCO

Kathleen Q. Abernathy
David A. Gross
AirTouch Communications
Suite 800
1818 N Street, N.W.
Washington, DC 20036

Charles D. Cosson
Lynn Van Housen
AirTouch Communications
28th Floor
One California Street
San Francisco, CA 94111

James H. Bolin, Jr.
Mark C. Rosenblum
Roy E. Hoffinger
AT&T Corp.
Room 3247H3
295 North Maple Avenue
Basking Ridge, NJ 07920

Peter Arth, Jr.
Lionel B. Wilson
Mary Mack Adu
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102

Rachel J. Rothstein
Cable & Wireless, Inc.
Room 616
8219 Leesburg Pike
Vienna, VA 22182

Wendy C. Chow
Michael Altschul
Randall S. Coleman
Cellular Telecommunications
Industry Association
Suite 200
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Glen B. Manishin
Blumenfeld & Cohen
Suite 700
1615 M Street, N.W.
Washington, DC 20036

MCI

Donna Roberts
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

David Cosson
L. Marie Guillory
National Telephone Cooperative
Association
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Richard A. Askoff
Perry S. Goldschein
National Exchange Carrier Association
100 South Jefferson Road
Whippany, NJ 07981

Douglas G. Smith
Omnipoint Communications, Inc.
7150 Campus Drive
Colorado Springs, CO 80920

R. Michael Senkowski
Katherine M. Holden
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

PCIA

Robert M. Lynch
Durward D. Dupre
Mary W. Marks
Southwestern Bell Telephone Company
Room 3520
One Bell Center
St. Louis, MO 63101

Nancy D. Ard
Nancy C. Woolf
Pacific Telesis Group
Room 1522-A
140 New Montgomery Street
San Francisco, CA 94105

Margaret E. Garber
Pacific Telesis Group
4th Floor
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Leon M. Kestenbaum
Norina T. Moy
Sprint Communications Company, Inc.
Suite 1100
1850 M Street, N.W.
Washington, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
Suite 701
1620 I Street, N.W.
Washington, DC 20006

TRA

Richard S. Whitt
Anne F. La Lena
WorldCom, Inc.
Suite 400
1120 Connecticut Avenue, N.W.
Washington, DC 20036

(CC92237G.KK/ss)
Last Update: 8/29/97